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No. 99-1688

IN THE SUPREME COURT OF THE UNITED STATES

Thomas Charles Kleve, *Petitioner,*

v.

D. R. Hill, Warden CCI; J. Gomez; Daniel E. Lundgren, Attorney General of the State of California, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

Throughout the Respondent's Brief in Opposition (hereafter "RB"), Respondent erroneously assumes that premeditation and deliberation are not required mental states for conspiracy to commit murder.

Respondent's error is based on a misreading of *People v. Cortez*, 18 Cal.4th 1223 (1998). *Cortez* held that, by finding an intent to kill and an intent to conspire, the jury necessarily finds the required mental states of premeditation and deliberation. Thus, those mental states must be inferred.

Cortez never says premeditation and deliberation are not required. When the dissent argued the majority was in fact finding that premeditation and deliberation were not elements of conspiracy to commit murder, *see Cortez*, at 1248 (Kennard, J., dissenting), the majority specifically said this was **not** what they were holding:

> "We are not concluding conspiracy to commit murder "requir[es] only intent to kill, we are instead merely recognizing that **the mental state required** for conviction of conspiracy to commit express malice murder ***necessarily equates with an establishes*** the mental state of deliberate and premeditated first degree murder."

See Cortez, at 1232-1233, n. 3 (emphasis in bold added; emphasis in italics in original).

In other words, premeditation and deliberation are necessarily found, even if only inferentially, when the jury finds an express intent to kill and an unlawful agreement to commit murder.

The issue here is simple. Petitioner was convicted of a crime that required, at the very least, an inferential finding of premeditation and deliberation. The jury **expressly found** those

mental states not proved and, consequently, they cannot be inferred. Therefore, Petitioner was convicted of a non-existent crime — to wit, conspiracy to commit second degree murder, or conspiracy to commit murder without the essential mental states of deliberation and premeditation.

ARGUMENT

I
RESPONDENT INCORRECTLY STATES THE LAW REGARDING THE EVOLUTION OF CONSPIRACY TO COMMIT MURDER

Respondent implies Petitioner's conviction was upheld partly because California law evolved and he was not entitled to the benefit of that evolution. *See* RB, at p. 4. The majority **never** says this. Rather, the majority says if the law evolved, Petitioner is not entitled to benefit; **but** it will assume *Cortez* held that conspiracy to commit second degree murder was *not* a crime at the time of Petitioner's conviction. *Kleve v. Hill,* 185 F.3d 1009, 1011-1012 (9th Cir. 1999) (Pet. App. at A-5-8).

This assumption is correct. The dictum in *People v. Horn,* 12 Cal.3d 290, 298-300 (1974), suggesting that there was such a crime as conspiracy to commit second degree murder was supported by certain language in Penal Code Section 189 and the then-recognized defense of diminished capacity. *See Cortez,* at 1234; *People v. Swain* (1996) 12 Cal.4th 593, 608. Subsequently, the California Supreme Court held *Horn*'s discussion of the viability of the offense of conspiracy to commit second degree express malice murder to be mere dictum. *See Swain,* at 606-607; *see also Cortez* at 1236 ("the plain fact remains that *Horn*'s interpretation . . . was dictum.").

In 1981, the legislature not only amended Penal Code Section 189, removing the language at issue, but also abolished

the defense of diminished capacity. *Id*, at 1234. Thus, **since at least 1981** whatever support had once existed for the dictum in *Horn* that California had a crime of conspiracy to commit second degree murder was gone. *Id.*, at 1234-1238. Petitioner's crime was committed in September 1987 — **six years after** the support for *Horn*'s dictum had vanished.

II
RESPONDENT INCORRECTLY ARGUES THAT *CORTEZ* DOES NOT REQUIRE PREMEDITATION AND DELIBERATION

Contrary to Respondent's arguments, *Cortez* held "where two or more persons conspire to commit murder ... each has acted with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder."" *Cortez*, at p. 1232 (citations deleted).

The court found it "inconceivable that two persons can harbor the mental state to commit express malice murder ... without being deemed to have willfully "premeditated and deliberated" the commission of that murder." *Id.*, at 1233, n. 3. The legislature's amendment of the conspiracy statute in 1955 merely recognized this. *Ibid.* The *Cortez* dissent wrongly suggested that the majority has ""unconstitutionally removed" **the requirement of proof of the requisite mental state or mental element** of conspiracy to commit murder." *Ibid* (emphasis added). By finding the existence of a conspiracy, the jury "has thereby **necessarily determined** that the conspirators premeditated and deliberated the commission of said murder." *Ibid* (emphasis added). The court concluded that "all conspiracy to commit murder is necessarily conspiracy to commit **premeditated and deliberated first degree murder.**" *Id.*, at p. 1237 (emphasis added). Yet even the majority in the Ninth Circuit believed the jury in Petitioner's case expressly

found that the necessary mental states were **not** proved: "It is true that petitioner's acquittal necessarily means that the jury found he did not premeditate and deliberate with respect to the target crime of murder." *Kleve*, 185 F.3d at 1013 (Pet. App. at A-10).

Again, despite Respondent's arguments, nowhere does *Cortez* say a person can be convicted of murder without proof of premeditation and deliberation. None of the later cases citing *Cortez* endorse the position advocated by Respondent. *See, e.g., People v. Simonton*, 70 Cal.App.4th 982 (1999); *People v. Herrera*, 70 Cal.App.4th 1456, 1465 (1999) ("[C]onspiracy to commit murder is necessarily conspiracy to commit premeditated murder, as any murder planned in advance is premeditated and deliberate.").

Therefore, there is no authority for Respondent's position that an agreement and an intent to kill "were all that was required under California law." *See* RB, at p. 10. *Cortez* is clear that premeditation and deliberation must be found: the jury may find it **inferentially**, but find it they must. As noted by Judge Kozinski and the eight dissenters:

> "In this case we cannot infer that "where two or more persons conspire to commit murder ... each has acted with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder,"" for the simple reason that we may not infer something that is contrary to a specific jury finding."

See Kleve v. Hill, 202 F.3d 1155, 1158 (9th Cir. 2000) (Kozinski, J., dissenting) (Pet. App. at B-6).

III
RESPONDENT MISUNDERSTANDS THE SIGNIFICANCE OF THE *POWELL* ISSUE

Respondent addresses the Ninth Circuit's misapplication

of *United States v. Powell*, 469 U.S. 57 (1984), by raising the prohibition against "new claims" in *Teague v. Lane*, 489 U.S. 288 (1989). This argument fails on several grounds.

First, there is no "new claim" here. Since 1955 conspiracy to commit second degree murder was a non-existent crime [*see Cortez* at pp. 1223, 1232, n. 3., 1236; *Kleve*, 185 F.3d at p. 1014 (Pet. App. At A-12) (Nelson, J., dissenting)]; therefore, the result sought by Petitioner is dictated or compelled by pre-existing precedent.

Second, *Teague* held that "new constitutional rules of criminal procedure" will not apply to those cases becoming final before the new rules are announced. *Id.*, at p. 310. There is nothing "new" about Petitioner's claim that he was convicted of a non-existent offense. *See, e.g., Bousley v. United States*, 118 S.Ct. 1604 (1998) (no "new claim" when Petitioner argued his guilty plea was not knowing and intelligent as this is a long established claim). Finally, *Teague* applies to procedural rules, not to substantive interpretations of criminal statutes, and certainly not to cases in which a Petitioner complains that he has been convicted of a non-existent crime. *Id.*

Respondent then turns directly to the *Powell* issue, but fails to understand Petitioner's argument. The majority misapplied *Powell* by finding the acquittal of conspiracy to commit first degree murder to be "merely inconsistent" with the conviction to commit second degree murder. But it is much more than that.

As discussed above, there can be no conspiracy to commit murder without a jury finding — whether express or implied — of premeditation and deliberation. As noted by the *Kleve* majority, the jury's acquittal of conspiracy to commit first degree murder was a "finding that petitioner did not conspire to murder with premeditation and deliberation." *Kleve*, 185 F.3d at 1013 (Pet. App. At A-10). Thus, the essential mental states were **not** found by the jury. This is not an inconsistency that

can be explained away by *Powell*. It is a negation of the mental states necessary for conviction.

According to Respondent:

> "The jury's finding with respect to the degree of the intended murder was simply superfluous, **and the acquittal on the first degree murder theory did not preclude the jury from finding beyond a reasonable doubt that Petitioner had the requisite mental state** to commit murder and had agreed to do so."

See RB, at p. 14 (emphasis added). This is contrary to *Cortez*, which states, time and again, that the requisite mental states of premeditation and deliberation must be found by the jury, even if inferentially. *See Cortez*, at pp. 1232, n. 3, 1233, 1236-1239.

Lastly, Respondent does not address Petitioner's claims that *Powell* controls only when the jury is properly instructed, and not when the trial judge erroneously instructs the jury on a non-existent crime. Indeed, Respondent admits one can infer the jury was improperly instructed. *See* RB, at p. 16.

IV
RESPONDENT FAILS TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS

Respondent claims there is no conflict with *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), arguing that, while "attempted perjury" was a non-existent crime, conspiracy to commit second degree murder was a real crime since "the necessary elements of the actual target crime are identical under either a theory of first degree or second degree express-malice murder." *See* RB, at p. 17. This is flatly wrong. Premeditation and deliberation were **not** required for second degree, and the jury was so instructed. *See* Reporter's Transcript of Proceedings, at pp. 363-365. In California, there is no crime of conspiracy to commit murder **without** premeditation and

deliberation. *See Cortez*, at pp. 1232, n. 3, 1233, 1236-1239.

Adams held the conviction of an offense declared by the State Supreme Court to be a non-existent crime is unconstitutional. California declared conspiracy to commit murder without premeditation and deliberation to be a non-existent crime. It is only the Ninth Circuit which said conspiracy to commit murder **without** premeditation and deliberation is the "functional equivalent" of conspiracy to commit murder **with** premeditation and deliberation. In *Cortez*, California held to the contrary. The conflict between the Circuits in *Adams* and *Kleve* is stark and irreconcilable.

CONCLUSION

Based on the arguments and authorities discussed above and in the petition for certiorari, this Court should grant the petition, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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